

**BEFORE THE HARYANA REAL ESTATE REGULATORY
AUTHORITY, GURUGRAM**

Complaint no.: 2046 of 2022
Order reserved on: 26.10.2023
Order pronounced on: 14.12.2023

1. Piyush Manocha
2. Vijay Laxmi

Both RR/o: - 4/90, Shivaji Nagar, Near SBI Bank, Gurugram

Complainants

Versus

M/s JMS Buildtech Private Limited.
Regd. Office at: - Plot No. 10, 5th Floor, Sector-44, Gurugram -
122001

Respondent

CORAM:

Shri Vijay Kumar Goyal

Member

APPEARANCE:

Shri Ankit Bhasin (Advocate)

Shri H.S Chohan and Vikrant Ahlawat (Advocates)

Complainant
Respondent

ORDER

1. This complaint has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is *inter alia* prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the Rules and regulations made thereunder or to the allottee as per the agreement for sale executed *inter se*.

A. Unit and project related details

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2. The particulars of unit details, sale consideration, the amount paid by the complainants, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S. No.	Particulars	Details
1.	Name and location of the project	"JMS Crosswalk", Sector 93, Gurugram
2.	Project area	Commercial component in plotted colony
3.	Nature of the project	125.594 acres
4.	DTCP license no. and validity status	44 of 2010 dated 09.06.2010
5.	Name of licensee	Ramprastha Estates Pvt Ltd. & ors.
6.	RERA Registered/ not registered	GGM/313/45/2019/07 dated 18.02.2019 Valid up to 31.12.2021
7.	Unit no.	FLEA-LG-51 [pg. 21 of complaint]
8.	Unit area admeasuring	184 sq. ft. [Page 21 of complaint]
9.	Allotment letter	01.03.2016 [Page 17 of complaint]
10.	Date of execution of buyer's agreement	17.06.2016 [Page 19 of complaint]
11.	Possession clause	15.1 POSSESSION OF THE UNIT <i>The company, based upon its present plans and estimates, and subject to all exceptions, proposes to handover possession of the unit within thirty-six (36) months computed from the date of execution of buyer's agreement, excluding additional grace period of six (6) months, subject to force majeure circumstance and reasons beyond the control of the company ("commitment period"). In case of failure of the allottee to make timely payments of any of the instalments as per the payment plan, along with other charges and dues as applicable or otherwise payable in</i>

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		<p><i>accordance with the payment plan or as per the demands raised by the company from time to time in this respect, despite acceptance of delayed payment along with interest or any failure on the part of the allottee to abide by any of the terms and conditions of this agreement, the time periods mentioned in this clause shall not be binding upon the company with respect to the handing over of the possession of the unit.</i></p> <p>[Page 33 of complaint]</p>
12.	Due date of possession	<p>17.06.2019</p> <p>[Note: grace period of 6 months not included]</p>
13.	Total sale consideration as per BBA dated 17.06.2016 at page 21 of complaint	Rs.13,80,368/-
14.	Total sale consideration as per customer ledger dated 03.12.2022 at pg. 72 of reply	Rs.14,54,381.20/-
15.	Amount paid by the complainant as per customer ledger dated 03.12.2022 at pg. 73 of reply	Rs.8,81,529/-
16.	Withdrawal request made by the complainant to the respondent company through Email	<p>22.10.2020</p> <p>(Page no. 59 of the reply)</p>
17.	Occupation certificate	<p>08.03.2022</p> <p>[Page 62 of reply]</p>
18.	Offer of possession	<p>10.11.2022</p> <p>[Page 64 of reply]</p>

B. Facts of the complaint

3. The complainants have made the following submissions: -

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- I. That in the year 2016, the complainants were looking for investing in commercial project and after inquiring from friends, they got to know about one upcoming real estate project namely "JMS CROSSWALK" situated in sector 93, Gurugram, hence, they initiated the discussions with the builder.
- II. That the complainants initiated the booking process on 16.02.2016 with sum of Rs.20,000/- (Customer Code V0035). After the payment of booking amount the complainants were allotted shop bearing no. FLEA-LG-51 in the above mentioned project.
- III. That after the payment made by the complainants, builder buyer's agreement was executed between the parties on 07.06.2016, for the total consideration of Rs.12,83,768/- and service tax.
- IV. That the complainants were paid an total amount of Rs.8,81,529/- to respondent which is approximately 70% of the total payment as per the demand of the builder. Here the payments were made under "Easy Payment Plan".
- V. That the respondent stopped responding to any of the complainant's phone call whenever the complainant tried to ask from the respondent about the status of the shop every time they ignored the calls and emails deliberately and on several occasions they have given vexatious replies to the emails of the complainants, after lot of persuasion it came to the knowledge of the complainants that the construction on the lower ground floor on which the instant shop is to be built is still vacant neither they have constructed any walls nor they have demarked the shops. The respondent misled the

complainants and gave several excuses regarding delayed construction of the project.

- VI. That they visited the office of the respondent several times for refund of all the above mentioned amount that is paid to the respondent but no response was received from the respondent, after feeling helpless and going through mental, physical and financial harassment, the complainants approached the respondent for refund but on each occasion, the respondent denied for the same on by giving false pretexts.
- VII. That in this way from last six years the complainant's hard earned money of Rs.8,81,529/- is stuck with the respondent since and in return the complainants have neither receive the unit nor money till now.
- VIII. That the cause of action accrued in favour of the complainants who booked this unit based on the representations of the respondent and possession of the said unit was due on December, 2019 and still there is no scope of completion of the project for another 3-4 years. And the refund of money has not been given to the complainants till date, the cause of action is still continuing.

C. Relief sought by the complainant:

4. The complainant has sought following relief(s):
- i. Direct the respondent to refund the entire amount of Rs.8,81,529/- paid by the complainant to the respondent along with interest.
 - ii. Direct the respondent to pay a sum of Rs.2,00,000/- to the complainant towards damages for deficiency in services, restrictive and unfair trade

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- practices, and towards physical and mental torture, agony, discomfort and undue hardship suffered by the complainant.
- iii. Direct the respondent to pay a sum of Rs.1,00,000/- towards the cost of litigation.
5. On the date of hearing, the authority explained to the respondent/promoter about the contravention as alleged to have been committed in relation to section 11(4)(a) of the Act to plead guilty or not to plead guilty.

D. Reply by respondent

6. The respondent by way of written reply made following submissions:-
- I. That the present complaint is an abuse of the process of this authority and process of law at the behest of the complainant. The complainant is trying to suppress material facts relevant to the matter and making false, misleading, frivolous, baseless, unsubstantiated allegations against the respondent with malicious intent and the sole purpose of the complainant behind filing the complaint is to extract unlawful gains from the respondent.
- II. That the complainant on 15.02.2016 expressed her interest in the project of the respondent and made a request for allotment of a commercial space in project being developed by respondent in terms of License issued by the Town & Country Planning Department, Haryana.
- III. That the respondent was allotted a shop bearing no. FLEA-LG-51, vide allotment letter dated 01.03.2016 to the complainant. Thereafter, the buyer's agreement was executed on 07.06.2016, for the total

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- consideration of Rs.13,80,368/- (which includes Rs.12,83,768/- as basic sale price ('BSP') and Rs.96,600/- as EDC/IDC) and other's charges, to which the complainant agreed to adhere.
- IV. That the complainant thereafter failed to make any payment despite the fact that the complainant was required to make the payment as per payment plan. That the complainant in total paid a sum of Rs.8,81,529/- which includes Rs.7,70,260/- as basic sale price, Rs.48,300/- as service tax, Rs.16,753/- as Service Tax and Rs.23,107/- as CGST. Despite receipt of various demand letters the complainant failed to pay the outstanding amount. The complainants vide email dated 22.10.2020 sought refund levelling false and frivolous allegations against the respondent. The respondent through its officials duly relied the said email on 24.10.2020 that the allotment stands cancelled on the request of the complainants and refund shall be processed by 22.01.2021 as per the terms and conditions as envisaged in the buyer's agreement.
- V. That the complainants along with his friend Mr. Adlakha meet the respondent officials and requested to allot some other unit and adjust the payments made by him with respect to unit no. LG-51. The officials of the respondent offered several units including unit no. SF02006. They initially lingered on the confirmation for allotment of unit no. SF02006 which is clear from the email dated 08.02.2021 and later on filed the present complaint.

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- VI. That delay in handing over the possession, if any, was due to the above-mentioned fault of the complainants and moreover the answering respondent has suffered in completion of its project due to two waves of COVID-19 pandemic (Buyer's agreement also includes force majeure clause (no 41) which says that in the event of a force majeure circumstances the respondent company shall be entitled to reasonable extension of time for performance of its obligations or to put it in abeyance). Hence, the answering respondent can't be liable for any delay in handing over the possession.
- VII. That the enactment of the Act of 2016, the respondent got registered its project "JMS Crosswalk" under the provisions of the Act with the competent authority vide registration no. RC/REP/HARERA/GGM/313/45/2019/07 dated 18.02.2019.
- VIII. That the respondent completed the development of the project and received occupation certificate with respect to the project vide memo no. STP(G)/2022/1278 dated 08.03.2022.
- IX. That the respondent on receipt of occupation certificate of the project and after completing internal formalities, issued letter of offer of possession dated 10.11.2022 along with proof of delivery to the complainant.
- X. That as the development of the project is complete and the occupation certificate has already been received, the complainants are not entitled to withdraw from the project and seek refund of the amount deposited by the complainants with the respondent. The complainants have no other

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option except to take possession of the commercial space after clearing the pending dues.

- XI. That the present complaint is not maintainable before this authority because the provisions of the Act, 2016 are not applicable to the facts of the present case and the said Act is prospective in nature. The agreement of the concerned/disputed property, took place prior to the coming into force of the said Act. Thus, the provisions contained therein and the reliefs envisaged cannot be applied to respondent project and agreements, which had already commenced prior to coming into force of the said Act. Also, for this same reason, the provisions contained therein and the reliefs envisaged under the said Act, which fully came into force w.e.f. 01.05.2017, cannot be applied to transactions executed (agreement and allotment) prior to the said date i.e. the date on which the provisions of the said Act came into force. The provisions of the said Act cannot operate retrospectively and imposed upon the respondent, for any of the actions done prior to coming into force of the said Act and prior to registration under the said Act. The provisions of the said Act have prospective operation, especially wherein inter-alia seeks to impose new burden. It is well settled law that a statute shall operate prospectively unless retrospective operation is clearly made out in the language of the Statute. In the absence of any express legislative intent of the retrospective application of the said Act, and by virtue of the fact that the

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said Act creates a new liability, the said act cannot be construed to have retrospective effect.

7. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submissions made by the parties.
8. The complainant and respondent have filed the written submissions on 05.12.2023 and 11.12.2023 respectively which are taken on record. No additional facts apart from the complaint or reply have been stated in the written submissions.

E. Jurisdiction of the Authority:

9. The authority has complete territorial and subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial Jurisdiction:

10. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram District. Therefore, this authority has complete territorial jurisdiction to deal with the present complaint.

E. II Subject-matter Jurisdiction:



11. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

Section 11(4)(a)

Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;

Section 34-Functions of the Authority:

34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

12. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.
13. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. 2021-2022 (1) RCR (Civil), 357*** and reiterated in case of ***M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022*** wherein it has been laid down as under:

"86. From the scheme of the Act of which a detailed reference has been made and taking note of power of adjudication delineated with the regulatory authority and adjudicating officer, what finally culls out is

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that although the Act indicates the distinct expressions like 'refund', 'interest', 'penalty' and 'compensation', a conjoint reading of Sections 18 and 19 clearly manifests that when it comes to refund of the amount, and interest on the refund amount, or directing payment of interest for delayed delivery of possession, or penalty and interest thereon, it is the regulatory authority which has the power to examine and determine the outcome of a complaint. At the same time, when it comes to a question of seeking the relief of adjudging compensation and interest thereon under Sections 12, 14, 18 and 19, the adjudicating officer exclusively has the power to determine, keeping in view the collective reading of Section 71 read with Section 72 of the Act. if the adjudication under Sections 12, 14, 18 and 19 other than compensation as envisaged, if extended to the adjudicating officer as prayed that, in our view, may intend to expand the ambit and scope of the powers and functions of the adjudicating officer under Section 71 and that would be against the mandate of the Act 2016."

14. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the cases mentioned above, the authority has the jurisdiction to entertain a complaint seeking refund of the amount and interest on the refund amount.

F. Findings on the objections raised by the respondent

F. I Objection regarding jurisdiction of authority w.r.t. buyer's agreement executed prior to coming into force of the Act.

15. The respondent raised an objection raised the respondent that the authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the flat buyer's agreement executed between the parties and no agreement for sale as referred to under the provisions of the Act or the said rules has been executed inter se parties. The authority is of the view that the Act nowhere provides, nor can be so construed, that all previous agreements will be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions/situation in a specific/particular

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manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. Numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of **Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others.**

(W.P 2737 of 2017) decided on 06.12.2017 which provides as under:

"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter.....

122. We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting/existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."

16. Also, in appeal no. 173 of 2019 titled as **Magic Eye Developer Pvt. Ltd. Vs. Ishwer Singh Dahiya**, in order dated 17.12.2019 the Haryana Real Estate Appellate Tribunal has observed-

"34. Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the provisions of the Act are quasi retroactive to some extent in operation and will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. Hence in case of delay in the offer/delivery of possession as per the terms and conditions of the agreement for sale the allottee shall be entitled to the interest/delayed possession charges on the reasonable rate of interest as provided in Rule 15 of the rules and one sided, unfair and unreasonable rate of compensation mentioned in the agreement for sale is liable to be ignored."

The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments/competent authorities and are not in contravention of any other Act, rules, statutes, instructions, directions issued thereunder and are not unreasonable or exorbitant in nature.

F.II Objection regarding delay in completion of construction of project due to outbreak of Covid-19.

17. From the bare reading of the possession clause of the buyer's agreement, it becomes very clear that the possession of the apartment was to be delivered within a period of 36 months from the date of execution of buyer's agreement i.e., (17.06.2016) which comes out to be 17.06.2019. Further, the respondent an additional grace period of six (6) months, subject to force majeure circumstance and reasons beyond the control of the company ("commitment period"). The respondent in its reply pleaded the force majeure clause on the ground of Covid- 19. The High Court of Delhi in case no. ***O.M.P (I) (COMM.) No. 88/2020 & I.As. 3696-3697/2020 title as M/S HALLIBURTON OFFSHORE SERVICES INC VS VEDANTA LIMITED & ANR. 29.05.2020*** it was held that the past non-performance of the Contractor cannot be condoned due to the COVID-19 lockdown in March 2020 in India. The Contractor was in breach

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since September 2019. Opportunities were given to the Contractor to cure the same repeatedly. Despite the same, the Contractor could not complete the Project. The outbreak of a pandemic cannot be used as an excuse for non-performance of a contract for which the deadlines were much before the outbreak itself. Thus, this means that the respondent/promoter has to complete the construction of the apartment/building by 17.06.2019. The respondent /promoter has not given any reasonable explanation as to why the construction of the project is being delayed and why the possession has not been offered to the complainant/allottee by the promised/committed time. The lockdown due to pandemic in the country began on 25.03.2020. So, the contention of the respondent/promoter to invoke the force majeure clause is to be rejected as it is a well settled law that **“No one can take benefit of his own wrong”**. Thus, in such a situation, the plea with regard to force majeure on ground of Covid- 19 is not sustainable.

G. Findings on the relief sought by the complainant.

G.I Direct the respondent to refund the entire amount of Rs.8,81,529/- paid by the complainant to the respondent along with interest.

18. In the present complaint, the complainants intend to withdraw from the project and are seeking return of the amount paid by them in respect of subject unit along with interest at the prescribed rate as provided under section 18(1) of the Act. Sec. 18(1) of the Act is reproduced below for ready reference.

“Section 18: - Return of amount and compensation

18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building.-

(a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or

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(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,

he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."

(Emphasis supplied)

19. Clause 15.1 of the buyer's agreement (in short, agreement) provides for handing over of possession and is reproduced below:

15. "POSSESSION OF THE UNIT"

*15.1 The company, based upon its present plans and estimates, and subject to all exceptions, proposes to handover possession of **the unit within thirty-six (36) months computed from the date of execution of buyer's agreement, excluding additional grace period of six (6) months, subject to force majeure circumstance and reasons beyond the control of the company ("commitment period")**. In case of failure of the allottee to make timely payments of any of the instalments as per the payment plan, along with other charges and dues as applicable or otherwise payable in accordance with the payment plan or as per the demands raised by the company from time to time in this respect, despite acceptance of delayed payment along with interest or any failure on the part of the allottee to abide by any of the terms and conditions of this agreement, the time periods mentioned in this clause shall not be binding upon the company with respect to the handing over of the possession of the unit."*

20. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and application, and the complainants not being in default under any provisions of these agreements and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are

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not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottees and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

21. **Due date of handing over possession and admissibility of grace period:**

The promoter has proposed to hand over the possession of the apartment within a period of 36 months plus 6 months grace period from date of buyer's agreement. The authority calculated due date of possession from the date of agreement i.e., 17.06.2016. The period of 36 months expired on 17.06.2019. Since in the present matter the BBA incorporates an additional grace period of six (6) months, subject to force majeure circumstance and reasons beyond the control of the company ("commitment period"). However, the respondent in its reply pleaded that the project was delayed due to spread of Covid-19. In view of the above findings recorded by the Authority in para 17 of this order the grace period of 6 months is dis-allowed being devoid of merits.



22. **Admissibility of refund along with prescribed rate of interest:** The complainants are seeking refund the amount paid by them along with interest prescribed rate of interest. However, the allottee intend to withdraw from the project and are seeking refund of the amount paid by them in respect of the subject unit with interest at prescribed rate as provided under rule 15 of the rules. Rule 15 has been reproduced as under:

Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]

- (1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.

Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.

23. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.
24. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on date i.e., 14.12.2023 is **8.75%**. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **10.75%**.
25. The definition of term 'interest' as defined under section 2(z) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall



be liable to pay the allottee, in case of default. The relevant section is reproduced below:

"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.

Explanation. —For the purpose of this clause—

- (i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;*
- (ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"*

26. The complainants vide email dated 22.10.2020, requested the respondent /promoter to refund the amount paid against the unit in question which is on page no. 59 of the reply annexed by the respondent/promoter and the same is reproduced as under for a ready reference: -

*Dear Sir,
Greetings of the Day!!*

.....

Conclusion:-

*That, after several meetings conducted on different dates with your team but no option / solution was provided on the same cost. As a result i am requesting you to **kindly proceed with the refund of my payment which is 881528/- which I had paid to builder on different dates through cheques before 8 Jan 2021 as per discussion.***

Your rapid response is highly appreciated.

27. During proceeding dated 26.10.2023, the counsel for the respondent stated that it has already obtained the occupation certificate on 08.03.2022 and has offered the possession of the unit to the complainants on 10.11.2022, whereas the complainants have filed the present complaint on 09.05.2022, after obtaining the occupation certificate. Hence, the complainants are not entitled

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- for full refund. He further stated that if refund is allowed, then the same may be granted after deduction of 10% of amount of the basic sale price.
28. On consideration of the documents available on record and submissions made by both the parties regarding contravention of provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 15.1 of the agreement executed between the parties on 17.06.2016, the possession of the subject apartment was to be delivered within a period of 36 months from the date of execution of buyer's agreement i.e., 17.06.2016 which comes out to be 17.06.2019. As far as grace period is concerned, the same is dis allowed for the reasons quoted above. Therefore, the due date of handing over of possession is 17.06.2019. Therefore, the due date of handing over possession is 17.06.2019.
29. Further, the authority observes that the respondent has obtained the occupation certificate on 08.03.2022. Whereas, the offer of possession was made on 10.11.2022 post filing of the present complaint. Therefore, the respondent was obligated to offer possession of the unit to the complainant after receipt of occupation certificate from the competent authority and thus, the respondent cannot take benefit of its own wrong. In view of the above-mentioned facts, the allottee intends to withdraw from the project and are well within the right to do the same in view of section 18(1) of the Act, 2016.
30. Moreover, the Hon'ble Supreme Court of India in the cases *of Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (supra)*

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reiterated in case of M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022.

observed as under: -

"25. The unqualified right of the allottee to seek refund referred Under Section 18(1)(a) and Section 19(4) of the Act is not dependent on any contingencies or stipulations thereof. It appears that the legislature has consciously provided this right of refund on demand as an unconditional absolute right to the allottee, if the promoter fails to give possession of the apartment, plot or building within the time stipulated under the terms of the agreement regardless of unforeseen events or stay orders of the Court/Tribunal, which is in either way not attributable to the allottee/home buyer, the promoter is under an obligation to refund the amount on demand with interest at the rate prescribed by the State Government including compensation in the manner provided under the Act with the proviso that if the allottee does not wish to withdraw from the project, he shall be entitled for interest for the period of delay till handing over possession at the rate prescribed."

31. The promoter is responsible for all obligations, responsibilities, and functions under the provisions of the Act of 2016, or the rules and regulations made thereunder or to the allottees as per agreement for sale under section 11(4)(a). The promoter has failed to complete or unable to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. Accordingly, the promoter is liable to the allottee, as he wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by it in respect of the unit with interest at such rate as may be prescribed.
32. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such, the complainants are entitled to refund of the entire amount paid by them at the prescribed rate of interest i.e., @ 10.75% p.a. (the State Bank of



India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

- G.II. Direct the respondent to pay a sum of Rs.2,00,000/- to the complainant towards damages for deficiency in services, restrictive and unfair trade practices, and towards physical and mental torture, agony, discomfort and undue hardship suffered by the complainant.**
- G.III Direct the respondent to pay a sum of Rs.1,00,000/- towards the cost of litigation.**

33. The above two reliefs are being dealt with together. The complainants are seeking above mentioned relief w.r.t. compensation. Hon'ble Supreme Court of India in case titled as *M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of UP & Ors. 2021-2022(1) RCR (C), 357* held that an allottee is entitled to claim compensation & litigation charges under sections 12,14,18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation & litigation expense shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation & legal expenses.


H. Directions of the authority

34. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):



- i. The respondent/promoter is directed to refund the entire paid-up amount i.e., Rs.8,81,529/- received by it from the complainants along with interest at the rate of 10.75% p.a. as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual realization of the amount.
 - ii. A period of 90 days is given to the respondent to comply with the directions given in this order and failing which legal consequences would follow.
 - iii. The respondent is further directed not to create any third-party rights against the subject unit before full realization of the paid-up amount along with interest thereon to the complainant and even if, any transfer is initiated with respect to subject unit, the receivables shall be first utilized for clearing dues of allottee-complainants.
35. Complaint stands disposed of.
36. File be consigned to registry.

Dated: 14.12.2023


(Vijay Kumar Goyal)
Member
Haryana Real Estate
Regulatory Authority,
Gurugram